Supreme Court, U.S.
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NO. 01 469

IN THE
SUPREME COURT OF THE UNITED STATES

JASON HECKEL,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court
Of The State of Washington

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Petitioner sent commercial advertisements from Oregon by electronic mail over the Internet. The State of Washington alleges that some of such were received by Washington residents, and that such e-mail was sent in a manner that violates Washington statutes.

The Unsolicited Electronic Mail Act RCW 19.190.010 et. sec. (1998) of the State of Washington prohibits

> "(1)... transmission of a commercial electronic mail message from a computer located in Washington or to an electronic mail address that the sender knows, or has reason to know, is held by a Washington resident that:
>
> (a) Uses a third party's Internet domain name without permission of the third party, or otherwise misrepresents any information in identifying the point of origin or the transmission path of a commercial electronic mail message; or
>
> (b) Contains false or misleading information in the subject line.

The question is whether the "dormant" Commerce Clause of the United States Constitution prohibits state legislative regulation of the header subject line and electronic routing information contained in commercial Internet electronic mail advertisements from an out-of-state business.

PARTIES TO THE PROCEEDINGS

Petitioner is Jason Heckel, an individual. Respondent is the State of Washington, by and through the Honorable Christine Gregoire, its Attorney General.

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Constitution and statutes:

U.S. Constitution:

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U.S. Const. Art. I, § 8, cl. 3 . . 2, 11

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Hamilton, Madison, and Jay, "The Federalist or The New Constitution" 1787-1788 . . . . . 10, 11

CITATION OF OFFICIAL REPORT OF OPINION ENTERED

State v. Heckel. 143 Wash. 2d 824, 24 P3d 404 (2001)

PETITION FOR A WRIT OF CERTIORARI

Petitioner Jason Heckel respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the state of Washington.

OPINIONS BELOW

The opinion of the Supreme Court of the state of Washington is attached (Appendix C, page App. 6). The opinion of the trial court, the Superior Court for King County, of the state of Washington, is attached (Appendix B, App.4).

JURISDICTION

The judgment of the Supreme Court of a state of Washington was entered on June 7, 2001. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause, U.S. Const. Art. I, § 8, cl. 3, provides that the United States Congress shall "regulate Commerce with foreign Nations, and among the several States ..." The pertinent provisions of the Unsolicited Electronic Mail Act of the state of Washington RCW 19.190.010. are reprinted in the appendix to this petition. (Appendix A, page App. 1)

STATEMENT OF THE CASE

Petitioner sent electronic mail advertisements to internet mail addresses.

The State brought civil legal action for injunctive relief and damages, as is recited in the Opinion of the Supreme Court of the State of Washington.

In his Answer to the Complaint, Petition alleged,

> "The Unsolicited Electronic Mail Act violates the Interstate Commerce clause of the Constitution of the United States of America, in that it would unreasonably burden and limit interstate commercial advertisement activities by a) Requiring advertisers to attempt to determine the state residency of electronic mail address holders before advertising to that electronic mail address, b) Presenting the prospect of different limitation on advertising content for each of the fifty states, unreasonably

burdening advertisers abilities to present commercial speech nationally."

Prior to trial, Petitioner filed a Motion for Summary Judgment as follows:

"COMES NOW, defendant, Jason Heckel, by and through his attorneys Dale L. Crandall, Charese Rohny, and Robert Van Siclen, and moves the Court for an order granting final summary judgment as to all claims in favor of Defendant and against Plaintiff, on the grounds that there is no genuine issue as to any material fact as to Defendant's Third Affirmative Defense (Commerce Clause of the United States Constitution), dismissing Plaintiff's Complaint and all the claims therein with prejudice, and allowing Defendant to apply for entry of final judgment, his costs and attorney fees."

The Motion was granted by the trial Court. The Order On Civil Motion Granting Defendants Summary Judgment is attached at Appendix B, page App. 4.

REASONS FOR GRANTING THE PETITION

This case is believed to represent the first ruling on these issues by a state court of last resort.

1. The Washington Supreme Court's decision has decided an important federal question in a way that conflicts with the decision of a United States court of appeals, specifically the decision of *American Civil Liberties Union v. Johnson*, 194 F.3d 1149 (Tenth Cir. decided November 2, 1999).

Petitioner contends that the Internet is a global infrastructure of commerce, that an e-mail address is not geopolitically located, but is instead ethereal and transient across state and national boundaries, and that therefore communications to an email address are not susceptible to state regulation under Commerce Clause principles.

Three federal courts have used the following three-question analysis, culminating in the *Johnson* decision:

1) Does the state law directly interfere with conduct occurring only outside that state's borders, even while regulating its proper intra-state concerns?

2) Even if the law regulates only commerce within its borders, do the burdens placed on commerce coming into the state unreasonably exceed any local benefit derived from it?

3) Does the law subject those conducting interstate commerce to inconsistent regulation as between the many states?

The decision of the Washington Supreme Court is contrary to the federal court analysis that has applied these tests to declare state attempts to interfere with Internet commercial communication as violations of the Commerce Clause.

The seminal case is *American Libraries Association; et al., v. Pataki, et al.*, 969 F.Supp. 160 (S.D. New York 1997). This holding has now stood for over three years, and has been followed by the other federal courts that have ruled on this issue. In this case, a group of plaintiffs sought a preliminary injunction against a New York statute making it a crime to use a computer to disseminate obscene material to minors. After a thorough and illuminating discussion of the difficulties of applying old legal analogies to the Internet, the court held that the statute failed each of the three tests, found the plaintiffs

likely to prevail ultimately in showing the statute to be an unconstitutional violation of the Commerce Clause, and granted the preliminary injunction. The Court concluded (at pages 183-184) that,

> "The protection of children from pedophilia is an entirely valid and laudable goal of State legislation. The New York Act's attempts to effectuate that goal, however, fall afoul of the Commerce Clause for three reasons. First, the practical impact of the New York Act results in the extraterritorial application of New York law to transactions involving citizens of other states and is therefore per se violative of the Commerce Clause. Second, the benefits derived from the Act are inconsequential in relation to the severe burdens it imposes on interstate commerce. Finally, the unique nature of cyberspace necessitates uniform national treatment and bars the states from enacting inconsistent regulatory schemes."

The Pataki analysis was followed *Cyberspace Communications, Inc. v. Engler*, 55 F. Supp. 2d 737 (E.D. Michigan, July 29, 1999), enjoining enforcement of a Michigan criminal statute prohibiting the use of the Internet to disseminate sexually explicit materials to minors, although Michigan's statute purported to apply only to speech that "originates" or "terminates" in Michigan.

Then, in *American Civil Liberties Union v. Johnson*, 194 F.3d 1149 (Tenth Cir. decided November 2, 1999), the ACLU and other Internet users sought a preliminary injunction against the enforcement of a New Mexico statute criminalizing dissemination by computer of material harmful to minors. The District Court had granted the injunction, 4 F.Supp.2d 1029, and the New Mexico officials appealed. Applying the three

tests, and following the *Pataki* analysis, the Court held that the statute was likely to violate the Commerce Clause. The state officials had argued, in part, that the statute could be validly construed if applied only to one-on-one e-mail communications. To that the Court replied (at page 1161),

> "Even if it is limited to one-on-one e-mail communications, as defendants assert section 30-37-3.2(A) properly is limited, there is no guarantee that a message from one New Mexican to another New Mexican will not travel through other states en route. See *Pataki*, 969 F.Supp. at 171; see also *Cyberspace, Communications, Inc.*, 55 F.Supp.2d at 751 ("virtually all Internet speech is ... available everywhere"). Thus, section 30-37-3.2(A) "cannot effectively be limited to purely intrastate communications over the Internet because no such communications exist." Pataki, 969 F.Supp. at 171. We therefore agree with the district court that section 30-37-3.2(A) ***represents an attempt to regulate interstate conduct occurring outside New Mexico's borders, and is accordingly a per se violation of the Commerce Clause.***" (Emphasis added)

In its decision, the Washington Supreme Court declared, in direct conflict to the *Johnson per se* holding, that "The inconsistent-regulations test and the extraterritoriality analysis are appropriately regarded as facets of the Pike balancing test," then stepped to its own analysis of whether "the burden imposed on . . . commerce [by the Act] is clearly excessive in relation to the putative local benefits."

Johnson Balancing Test Issue The decision of the Washington Supreme Court is in conflict with the *Johnson* "benefits and burdens" analysis, because the advertiser must

investigate the residency of every prospective e-mail address holder while perhaps only one in fifty may turn out to be a Washington resident, and that list may be valid one week, but inaccurate the very next week, if e-mail address holders move to or from Washington. Hypothetically, to comply with the investigation requirements of the Act, the business intending to send 100,000 advertisements must send 100,000 requests for residency information to registrants of the domain names of the customer's e-mail address, and then hope for 100,000 responses. As a separate and substantial burden on interstate commerce largely outside the boundaries of Washington, the Act assumes that the domain name registrants are expected to deal with such requests and respond to them, reporting the state of residency of its e-mail address holders. If the investigation is to be conducted by e-mail to the domain name registrants, then there would be 100,000 e-mail residency requests and 100,000 e-mail residency responses if all the players follow the statute. Obviously the logistics of such investigation by businesses and responses by domain name registrants (who have no incentive to respond) are daunting, and are almost certainly to be ignored by businesses and domain name registrants both within the United States and outside its borders, such that the state will derive inconsequential benefits when weighed against that burdensome process.

Johnson had held (at 1162),

> "[The state's] own interpretation of the statute--that it applies only to one-on-one communications between a sender in New Mexico and a recipient in New Mexico whom the sender knows to be a minor--renders it so narrow in scope that the actual benefit conferred is extremely small. As another district court has observed

with respect to the CDA, which defendants argue is broader in scope than section 30-37-3.2(A):

> [The statute] will almost certainly fail to accomplish the Government's interest in shielding children from pornography on the Internet. Nearly half of Internet communications originate outside the United States, and some percentage of that figure represents pornography. Pornography from, say, Amsterdam will be no less appealing to a child on the Internet than pornography from [Albuquerque], and residents of Amsterdam have little incentive to comply with [the statute].

ACLU v. Reno, 929 F.Supp. 824, 882 (E.D.Pa.1996), aff'd, 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). Balanced against those limited local benefits "is an extreme burden on interstate commerce." Pataki, 969 F.Supp. at 179. Thus, section 30-37-3.2(A) constitutes an invalid indirect regulation of interstate commerce."

The "balancing" analysis of the Washington Supreme Court is not saved by its reliance on its state-law definition that the Defendant's activities were "deceptive."

There is no agreement among the states as to whether the type of advertising done by petitioner is deceptive, and it is apparently legal in at least thirty states. Among the approximately twenty states that have passed statutes governing commercial e-mail, there is substantial variation between the regulations. A California trial court has struck down, using the federal court Commerce Clause tests, California's statute regulating commercial email. *Ferguson v. Friendfinder, Inc.*,

California Superior Court for San Francisco County, Case No. 307309 (June 2, 2000). That case is apparently on appeal.

Thus, the decision of the Washington Supreme Court should be reviewed to resolve its analysis with *Johnson*.

2. The Washington Supreme Court has decided two important questions of federal law that have not been, but should be, settled by this Court, specifically

a) The principles of interstate commerce unfettered by multiple state regulation, and of sole federal control of the infrastructures of interstate and foreign commerce, are at the core of American federalism, and commercial communication on the Internet should be governed, if at all, only by clear, nationally deliberated, and uniform federal law to avoid its hindrance; and

b) As applied to this out-of-state Petitioner, this Court should settle whether the Commerce Clause "nexus" test of *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992) applies to limit state law regulation of an out-of-state business, as an extension of the *Quill* holding that the nexus test limits state taxation of an out-state-business. The Washington Supreme Court disregarded this Commerce Clause analysis without mention in its decision, although *Quill* had been cited and argued on that issue.

Infrastructure/Inconsistent Regulation Issue

American constitutional federalism is making only its second expedition into a pre-existing pervasive infrastructure of worldwide commerce. The first was in the formation of America, and the infrastructure then was the commerce by boat

and ship on the rivers and lakes, along the coastlines, and across the ocean bordering the original states.

The Federalist Papers No. XI[1] is entitled "The Utility Of The Union In Respect To Commercial Relations And A Navy". Written in 1787 to support the joinder of the Union, it argues, in part:

> "The importance of the Union, in a commercial light, is one of the points about which there it is least room to entertain a difference of opinion, and which has, in fact, commanded the most general assent of men who have any acquaintance with the subject. This applies as well to our intercourse with foreign countries as with each other....
>
> But in a state of disunion, ... [t]hat unequalled spirit of enterprise, which signalizes the genius of American merchants and navigators, and which is in itself an exhaustible mine of national wealth, would be stifled and lost,...
>
> "An unrestrained intercourse between the states themselves will advance the trade of each by an interchange of their respective productions, not only for the supply of reciprocal ones at home, but for expectation to foreign markets....
>
> "It may perhaps be [argued], that whether the States are united or disunited, there would still be an intimate intercourse between them which would answer the same ends; but this intercourse would be fettered, interrupted, and narrowed by a multiplicity of causes,

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1 Hamilton, Madison, and Jay,
"The Federalist or The New Constitution" 1787-1788.

which in the course of these papers have been amply detailed. A unity of commercial, as well as political, interests, can only result from a unity of government."

Federalist Paper No. XI, though only about eight pages in length, argues for two institutions: a common, unified control of interstate and foreign commerce by the federal government, and a common unified Navy to protect and enhance trade. The reason for joinder of these arguments was, of course, that both interstate and foreign commerce, at the time, were dominated by the shipment of tangible goods over the oceans and rivers. It is illuminating that the essay argues that the nation's interests in a common Navy, to protect the waterways of the states and coastlines of the country, were the same, parallel and coextensive, with its interests in unified and unregulated commerce.

The Commerce Clause, U.S. Const. Art. I, § 8, cl. 3, contains an express authorization for Congress to "regulate Commerce with foreign Nations, and among the several States ...". In the analysis of the case at bar, it is important that Congress' authority over both foreign and interstate commerce are granted in the same breath. It is also notable that the "same breath" of authority to the federal government also includes the other two then-existing means of interstate and foreign commerce: 'to establish post-offices and post-roads' (id., par. 7). For all the same reasons that interstate and foreign commerce were viewed in conjunction as to shipping, so should interstate and foreign commerce be viewed in conjunction as to the Internet. If anything, it is certainly easier to send a book by email from India now than by ship in 1788. Yet the constitutional federalism issues are the same as then, and the state's power to regulate that transaction no larger, yet certainly

less distinguishable as to whether that transaction is from a foreign country or a neighbor state.

A "dormant" or "negative" aspect of the grant, to the federal government, of power over commerce among the states is that a state's power to impinge on interstate commerce may be limited in some situations. *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992). The "dormant implication of the Commerce Clause prohibits state ... regulation ... that discriminates against or unduly burdens interstate commerce and thereby 'imped[es] free private trade in the national marketplace.' " *General Motors Corp. v. Tracy*, 519 U.S. 278, 287, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997).

Over the first 70 years of the development of commerce in America, there was incremental growth of the infrastructures of commerce (steamships, railroads, highways), attended by incremental growth of Commerce Clause law. Until the development of the telegraph, early analogies could be easily applied in casting the roles of state and federal regulation. The telegraph, however, was qualitatively different and required new thought. Like the Internet, and unlike the railroads, which were primarily developed in partnership with the preemption and eminent domain powers of the federal government, telegraph had surged into common private sector commercial usage before a unified national approach could be taken as to regulation of telegraph communications.

In *Pensacola Tel. Co. V. Western Union Tel. Co.*, 96 U.S. 1 (1877), the Court made remarkably prophetic analysis of this exciting new medium of communication:

> "Since the case of *Gibbons v. Ogden* (9 Wheat. 1), it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. Post-offices and post-

roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the national government.

"The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation.

"The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business, and become one of the necessities of commerce. It is indispensable as a means of inter-communication, but especially is it so in commercial transactions. The statistics of the business before the recent reduction in rates show that more than eighty per cent of all the

messages sent by telegraph related to commerce. Goods are sold and money paid upon telegraphic orders. Contracts are made by telegraphic correspondence, cargoes secured, and the movement of ships directed. The telegraphic announcement of the markets abroad regulates prices at home, and a prudent merchant rarely enters upon an important transaction without using the telegraph freely to secure information.

"It is not only important to the people, but to the government. By means of it the heads of the departments in Washington are kept in close communication with all their various agencies at home and abroad, and can know at almost any hour, by inquiry, what is transpiring any where that affects the interest they have in charge. Under such circumstances, it cannot for a moment be doubted that this powerful agency of commerce and intercommunication comes within the controlling power of Congress, certainly as against hostile State legislation." (at 96 U.S. 1, 10-11)

The dormant Commerce Clause was literally "dormant" through the first half of the 20th century, because the federal government used the Commerce Clause and the Supremacy Clause to affirmatively enter interstate commerce almost wherever it could find the slightest premise through a period of broad expansion of federal involvement in historically local business issues.

When Arizona attempted to apply its police powers to govern train length out of concern for passenger safety, this Court identified again the dormant Commerce Clause protections of national infrastructures of commerce (the railroads) in *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945).

Even the facially simple notion that the state of Washington may take enforcement action against someone who "uses a third party's domain name without permission of the third party" is fraught with basic Commerce Clause type of problems and perils of inconsistency: How does state law establish the ownership of a domain name? Is the ownership a state property interest? How does state law respecting ownership of domain names correspond with international agreements?

Commerce Clause Nexus Issue Additionally, in an as-applied analysis as to this out of state business, this Court should review whether internet e-mail advertisers are protected from regulation by a "nexus" test as to their business presence in the regulating state.

In *Quill Corporation v. North Dakota*, 504 U.S. 298, 112 S.Ct.1904 (1992), the United States Supreme Court invalidated North Dakota's sales use tax as against Quill Corporation, an out-of-state office supply mail order retailer. Quill Corporation had no physical facilities and no sales agents in North Dakota, but approximately 24 tons of catalogs and flyers were mailed by Quill into North Dakota every year. Quill was the sixth largest vendor of office supplies in the state, with annual sales of almost $1 million. The Court discussed the "nexus" requirements of the Commerce Clause, as opposed to Due Process considerations, writing,

> "In this case, there is no question that Quill has purposefully directed its activities at North Dakota residents, that the magnitude of those contacts is more than sufficient for due process purposes, and that the use tax is related to the benefits Quill receives from access to the State.

"The State contends that the nexus requirements imposed by the Due Process and Commerce Clauses are equivalent and that if, as we concluded above, a mail-order house that lacks a physical presence in the taxing State nonetheless satisfies the due process "minimum contacts" test, then that corporation also meets the Commerce Clause "substantial nexus" test. We disagree. Despite the similarity in phrasing, the nexus requirements of the Due Process and Commerce Clauses are not identical. The two standards are animated by different constitutional concerns and policies.

"Due process centrally concerns the fundamental fairness of governmental activity. Thus, at the most general level, the due process nexus analysis requires that we ask whether an individual's connections with a State are substantial enough to legitimate the State's exercise of power over him. We have, therefore, often identified "notice" or "fair warning" as the analytic touchstone of due process nexus analysis. In contrast, the Commerce Clause and its nexus requirement are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy. Under the Articles of Confederation, state taxes and duties hindered and suppressed interstate commerce; the Framers intended the Commerce Clause as a cure for these structural ills. See generally The Federalist Nos. 7, 11 (A. Hamilton). It is in this light that we have interpreted the negative implication of the Commerce Clause. Accordingly, we have ruled that the Clause prohibits discrimination against interstate

commerce, (citations omitted), and bars state regulations that unduly burden interstate commerce, (citations omitted)." (at 312)

Certainly, contacts of Petitioner with the State of Washington are less than those of Quill Corporation with the State of North Dakota. In particular, email advertisement (or for that matter, any Internet advertisement) has much less geopolitical nexus to any particular state than the sending of tangible catalogs to physical geographic addresses.

Petitioner argued that the *Quill* analysis applies to internet advertising. The Washington Supreme Court decision did not address the argument nor mention *Quill*. This Court should review whether *Quill* applies to regulation as well as taxation.

3. The Washington Supreme Court has decided an important question of federal law in a way that conflicts with relevant decisions of the Court, specifically by deciding that the "extraterritorial" consequences of a state law regulating interstate commerce is only a facet of the "balance of burdens and benefits" test, which conflicts with the decision (plurality) in *Edgar V. Mite Corporation* 457 US 624,102 SCt 2629 (1982), that, "The Commerce Clause also precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."

As routine commerce increasing defied geographical boundaries, state governments were increasingly tempted toward protection of local interests. Many of these state statutes involved economic protectionism, but in *Edgar V. Mite Corporation* 457 US 624,102 SCt 2629 (1982), the Dormant Commerce Clause was applied to prevent "extraterritorial"

application of a state's law outside its jurisdiction. There, the Court struck down a regulatory statute requiring advance disclosure of tender offers for purchase of stock interests in corporations having business interests in Illinois. The Court wrote,

> "The Illinois Act differs substantially from state blue-sky laws in that it directly regulates transactions which take place across state lines, even if wholly outside the State of Illinois. A tender offer for securities of a publicly held corporation is ordinarily communicated by the use of the mails or other means of interstate commerce to shareholders across the country and abroad. Securities are tendered and transactions closed by similar means. (At 641)
>
> "Thus the Act could be applied to regulate a tender offer which would not affect a single Illinois shareholder.
>
> "It is therefore apparent that the Illinois statute is a direct restraint on interstate commerce and that it has a sweeping extraterritorial effect. Furthermore, if Illinois may impose such regulations, so may other States; and interstate commerce in securities transactions generated by tender offers would be thoroughly stifled. In Shafer v. Farmers Grain Co., supra, at 199, 45 S.Ct., at 485, the Court held that "a state statute which by its necessary operation directly interferes with or burdens [interstate] commerce is a prohibited regulation and invalid, regardless of the purpose with which it was enacted." See also *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806, 96 S.Ct. 2488, 2496, 49 L.Ed.2d 220 (1976). The Commerce Clause also precludes the application of a state statute

to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State... The limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." *Shaffer v. Heitner*, 433 U.S. 186, 197, 97 S.Ct. 2569, 2576, 53 L.Ed.2d 683 (1977). (at 642-643)...

"While protecting local investors is plainly a legitimate state objective, the State has no legitimate interest in protecting nonresident shareholders. Insofar as the Illinois law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law." (At 644)

The Petitioner here had argued similar "extraterritorial" consequences of the Washington law in issue here. Specifically, Petitioner argued that since electronic mail messages to an e-mail address "owned" by a Washington resident could be received while the Washington resident was outside Washington, the Act facially regulated commercial communications which did not necessarily occur within Washington's borders, and might chill the prospect of such communications. The Washington Supreme Court decision summarily disposed of that argument, declaring that such a situation raised only "a jurisdictional question not at issue in this case." That ruling should be reviewed, because, since e-mail addresses have no geographical location, advertisers cannot know which "jurisdiction" governs their interstate communication until after the event of receipt.

CONCLUSION

This is a case of first impression on several important issues which will determine the way that American federalism and foreign policy toward international law govern commerce on the Internet. The Internet is a rapidly evolving, innovative infrastructure of national and international commerce, requiring fluidity and uniformity that should be addressed by an analysis of this Court. This Court should lay the groundwork for analysis of state regulation of commercial e-mail that can be applied in the absence of federal regulation. The alternative is the chilling uncertainty, delay and inconsistency of leaving the definition of universal Internet terms and processes to local juries, local courts, and local governments. Much the same as this Court's recent need to revisit the legal geography of "community standards" in First Amendment law as it relates to the Internet, the Commerce Clause needs illumination in cyberspace.

Respectfully submitted,

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APPENDIX A

"RCW 19.190.010. The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Commercial electronic mail message" means an electronic mail message sent for the purpose of promoting real property, goods, or services for sale or lease.

(2) "Electronic mail address" means a destination, commonly expressed as a string of characters, to which electronic mail may be sent or delivered.

(3) "Initiate the transmission" refers to the action by the original sender of an electronic mail message, not to the action by any intervening interactive computer service that may handle or retransmit the message.

(4) "Interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(5) "Internet domain name" refers to a globally unique, hierarchical reference to an Internet host or service, assigned through centralized Internet naming authorities, comprising a series of character strings

separated by periods, with the right-most string specifying the top of the hierarchy.

RCW 19.190.020 (1) No person, corporation, partnership, or association may initiate the transmission of a commercial electronic mail message from a computer located in Washington or to an electronic mail address that the sender knows, or has reason to know, is held by a Washington resident that:

(a) Uses a third party's Internet domain name without permission of the third party, or otherwise misrepresents any information in identifying the point of origin or the transmission path of a commercial electronic mail message; or

(b) Contains false or misleading information in the subject line.

(2) For purposes of this section, a person, corporation, partnership, or association knows that the intended recipient of a commercial electronic mail message is a Washington resident if that information is available, upon request, from the registrant of the Internet domain name contained in the recipient's electronic mail address.

RCW 19.190.030. (1) It is a violation of the consumer protection act, chapter 19.86 RCW, to initiate the transmission of a commercial electronic mail message that:

(a) Uses a third party's Internet domain name without permission of the third party, or otherwise misrepresents any information in identifying the point of origin or the transmission path of a commercial electronic mail message; or

(b) Contains false or misleading information in the subject line.

(2) The legislature finds that the practices covered by this chapter are matters vitally affecting the public interest for the purpose of applying the consumer protection act, chapter 19.86 RCW. A violation of this chapter is not reasonable in relation to the development and preservation of business and is an unfair or deceptive act in trade or commerce and an unfair method of competition for the purpose of applying the consumer protection act, chapter 19.86 RCW."

TRIAL COURT ORDER
GRANTING SUMMARY JUDGMENT

Superior Court of Washington
County of King

State of Washington, Plaintiff,	)	
	)	No. 98-2-25480-7 SEA
vs.	)	
	)	ORDER ON CIVIL
Jason Heckel, dba,	)	MOTION
Natural Instincts	)	Granting Defendants
Defendant.	)	Summary Judgment
	)	

The above-entitled court, having heard a motion for Summary Judgment & Cross-motion for summary [sic], the Court having received the records & files herein including Defendant's Motion for Summary Judgment; Plaintiff's Response and Cross-motion for Summary Judgment, Defendant's Reply, all declarations filed collaterally with the aforementioned pleadings, having heard oral argument of counsel and finding there exists no material issue of fact respecting defendant's motion, and finding that material facts exist respecting Plaintiffs Cross-motion, and finding that the statute in question here violates the Federal Interstate Commerce Clause of United States Constitution (Article 1, sec 8, cl. 3), that the Washington statute is unduly restrictive and burdensome; Now Therefore, it is hereby ordered that Defendant's Motion for Summary Judgment is granted and all claims of Plaintiff's Complaint are dismissed with prejudice.

Defendant may present a cost bill for recovery of his costs and statutory attorneys fees.

Dated March 10, 2000.

s/ Palmer Robinson
Judge

Presented by:
s/ Robert C. Van Siclen
s/ Dale L. Crandall

OPINION OF THE SUPREME COURT
OF THE STATE OF WASHINGTON

FILE
IN CLERK'S OFFICE
SUPREME COURT, STATE OF WASHINGTON
DATE: JUN 07, 2001
s/ Alexander, C.J.

STATE OF WASHINGTON,	)
	)
Appellant,	) No. 69416-8
	)
v.	) En Banc
	)
JASON HECKEL, doing business as NATURAL INSTINCTS,	)
	)
	)
Respondent.	) Filed June 7, 2001
	)

OWENS, J. -- The State of Washington filed suit against Oregon resident Jason Heckel, alleging that his transmissions of electronic mail(e-mail) to Washington residents violated Washington's commercial electronic mail act, chapter 19.190 RCW (the Act). On cross-motions for summary judgment, the trial court dismissed the State's suit against Heckel, concluding that the Act violated the dormant Commerce Clause of the united States Constitution. This court granted the State's request for direct review. We hold that the Act does not unduly burden interstate commerce. We reverse the trial court's

dismissal of the State's suit, vacate the order on attorney fees, and remand this matter for trial.

FACTS

As early as February 1996, defendant Jason Heckel, an Oregon resident doing business as Natural Instincts, began sending unsolicited commercial e-mail (UCE), or 'spam,' over the Internet.1 In 1997, Heckel developed a 46-page on-line booklet entitled 'How to Profit from the Internet.' The booklet described how to set up an on-line promotional business, acquire free e-mail accounts, and obtain software for sending bulk e-mail. From june 1998, Heckel marketed the booklet by sending between 100,000 and1,000,000 UCE messages per week. To acquire the large volume of e-mailaddresses,2 Heckel used the Extractor Pro software program, which harvests e-mail addresses from various on-line sources and enables a spammer to direct a bulk-mail message to those addresses by entering a simple command. The Extractor Pro program requires the spammer to enter a return e-mail address, a subject line,3 and the text of the message to be sent. The text of Heckel's UCE was a lengthy sales pitch that included testimonials from satisfied purchasers and culminated in an order form that the recipient could download and print. The order form included the Salem, Oregon, mailing address for Natural Instincts. Charging $39.95 for the booklet, Heckel made 30 to 50 sales per month. In June 1998, the Consumer Protection Division of the Washington State attorney General's Office received complaints from Washington recipients of Heckel's UCE messages. The complaints alleged that Heckel's messages contained misleading subject lines and false transmission paths.4Responding to the June complaints, David Hill, an inspector from the Consumer Protection Division, sent Heckel

a letter advising him of the existence of the Act. The Act provides that anyone sending a commercial e-mail message from a computer located in Washington or to an e-mail address held by a Washington resident may not use a third-party's domain name without permission,5 misrepresent or disguise in any other way the message's point of origin or transmission path, or use a misleading subject line.6 RCW 19.190.030 makes a violation of the Act a per se violation of the Consumer Protection Act, chapter 19.86 RCW (CPA). Responding to Hill's letter, Heckel telephoned Hill on or around June25, 1998. According to Hill, he discussed with Heckel the provisions of the Act and the procedures bulk e-mailers can follow to identify e-mail addressees who are Washington residents. Nevertheless, the Attorney General's Office continued to receive consumer complaints alleging that Heckel's bulk e-mailings from Natural Instincts appeared to contain misleading subject lines, false or unusable return e-mail addresses, and false or misleading transmission paths. Between June and September 1998,the Consumer Protection Division of the Attorney General's Office documented 20 complaints from 17 recipients of Heckel's UCE messages. On October 22, 1998, the State filed suit against Heckel, stating three causes of action. First, the State alleged that Heckel had violated RCW19.190.020(1)(b) and, in turn, the CPA, by using false or misleading information in the subject line of his UCE messages. Heckel used one of two subject lines to introduce his solicitations: 'Did I get the right e-mail address?' and 'For your review--HANDS OFF!' Clerk's Papers (CP) at 6,92, 113. In the State's view, the first subject line falsely suggested that an acquaintance of the recipient was trying to make contact, while the second subject line invited the misperception that the message contained classified information for the particular

recipient's review. As its second cause of action, the State alleged that Heckel had violated RCW 19.190.020(1)(a), and thus the CPA, by misrepresenting information defining the transmission paths of his UCE messages. Heckel routed his spam through at least a dozen different domain names without receiving permission to do so from the registered owners of those names. For example, of the 20 complaints the Attorney General's Office received concerning Heckel's spam, 9 of the messages showed '13.com' as the initial ISP to transmit his spam. CP at 44, 113. The 13.com domain name, however, was registered as early as November 1995 to another individual, from whom Heckel had not sought or received permission to use the registered name. In fact, because the owner of 13.com had not yet even activated that domain name, no messages could have been sent or received through 13.com. Additionally, the State alleged that Heckel had violated the CPA by failing to provide a valid return e-mail address to which bulk-mail recipients could respond. When Heckel created his spam with the Extractor Pro software, he used at least a dozen different return e-mail addresses with the domain name 'juno.com' (Heckel used the Juno accounts in part because they were free). CP at 88-89. None of the Juno e-mail accounts was readily identifiable as belonging to Heckel; the user names that he registered generally consisted of a name or a name plus a number (e.g.,'marlin1374,' 'cindyt5667,' 'howardwesley13,' 'johnjacobson1374,' and 'sjtowns'). CP at 88-89. During August and September 1998, Heckel's Juno addresses were canceled within two days of his sending out a bulk e-mail message on the account. According to Heckel, when Juno canceled one e-mail account, he would simply open a new one and send out another bulk mailing. Because Heckel's accounts were canceled so rapidly, recipients who attempted to reply

were unsuccessful. The State thus contended that Heckel's practice of cycling through e-mail addresses ensured that those addresses were useless to the recipients of his UCE messages.7 During the months that Heckel was sending out bulk e-mail solicitations on the Juno accounts, he maintained a personal e-mail account from which he sent no spam, but that e-mail address was not included in any of his spam messages. The State asserted that Heckel's use of such ephemeral e-mail addresses in his UCE amounted to a deceptive practice in violation of RCW 19.86.020.The State sought a permanent injunction and, pursuant to RCW 19.86.140 and.080 of the CPA, requested civil penalties, as well as costs and a reasonable attorney fee. In early 2000, the parties cross-moved for summary judgment. On March 10, 2000, the trial court entered an order granting Heckel's motion and denying the State's cross motion. The court found that the Act violated the Commerce Clause (U.S. Const. art. I, sec.8, cl. 3) and was 'unduly restrictive and burdensome.' CP at 175. The order permitted Heckel to 'present a cost bill for recovery of his costs and statutory attorneys fees.' CP at 175. Heckel then moved the court fora fee award of $49,897.50. Denying Heckel's request for fees under RCW19.86.080 of the CPA, the court limited Heckel's award to statutory costs under RCW 4.84.030. Challenging the trial court's finding that the Act violated the Commerce Clause, the State sought this court's direct review. Heckel cross-appealed, seeking reversal of the trial court's denial of his attorney fee request under the CPA. We granted direct review.

ISSUE

Does the Act, which prohibits misrepresentation in the subject line or transmission path of any commercial e-mail message sent to Washington residents or from a Washington computer, unconstitutionally burden interstate commerce?

ANALYSIS

Standard of Review. The State seeks review of the trial court's decision on summary judgment that the Act violated the dormant Commerce Clause. This court reviews de novo a trial court's grant of summary judgment and views all facts in the light most favorable to the party challenging the summary dismissal. Lybbert v. Grant County, 141 Wn.2d 29, 34, 1 P.3d 1124(2000). A legislative act is presumptively constitutional, 'and the party challenging it bears the burden of proving it unconstitutional beyond a reasonable doubt.' State v. Brayman, 110 Wn.2d 183, 193, 751 P.2d 294(1988); see also Frach v. Schoettler, 46 Wn.2d 281, 280 P.2d 1038, cert.denied, 350 U.S. 838 (1955). A party meets the standard 'if argument and research show that there is no reasonable doubt that the statute violates the constitution.' Amalgamated Transit Union Local 587 v. State, 142 Wn.2d183, 205, 11 P.3d 762 (2000) (citing Belas v. Kiga, 135 Wn.2d 913, 920, 959P.2d 1037 (1998)).Heckel's Challenge under the Commerce Clause. The Commerce Clause grants Congress the 'power . . . {t}o regulate commerce with foreign nations, and among the several states.' U.S. Const. art. I, sec. 8, cl. 3. Implicit in this affirmative grant is the negative or 'dormant' Commerce Clause--the principle that the states impermissibly intrude on this federal power when they enact laws that unduly burden interstate commerce. See Franks & Son, Inc. v. State, 136 Wn.2d 737, 747, 966 P.2d 1232 (1998). Analysis of a state law under the dormant Commerce Clause generally follows a two-step process. We first determine whether the state law openly discriminates against interstate commerce in favor of intrastate economic interests. If the law is facially neutral, applying impartially to in-state and out-of-state businesses, the analysis moves to the second step, a balancing of the local benefits against the

interstate burdens: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities . . . .

Id. at 754 (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844, 25 L. Ed. 2d 174 (1970)). The Act is not facially discriminatory. The Act applies evenhandedly to in-state and out-of-state spammers: 'No person' may transmit the proscribed commercial e-mail messages 'from a computer located in Washington or to an electronic mail address that the sender knows, or has reason to know, is held by a Washington resident.' RCW 19.190.020(1)(emphasis added). Thus, just as the statute applied to Heckel, an Oregon resident, it is enforceable against a Washington business engaging in the same practices. Because we conclude that the Act's local benefits surpass any alleged burden on interstate commerce, the statute likewise survives the Pike balancing test. The Act protects the interests of three groups--ISPs, actual owners of forged domain names, and e-mail users. The problems that spam causes have been discussed in prior cases and legislative hearings. A federal district court described the harms a mass e-mailer caused ISP CompuServe: In the present case, any value CompuServe realizes from its computer equipment is wholly derived from the extent to which that equipment can serve its subscriber base. . . . {H}andling the enormous volume of mass mailings that CompuServe receives places a tremendous burden on its

equipment. Defendants' more recent practice of evading CompuServe's filters by disguising the origin of their messages commandeers even more computer resources because CompuServe's computers are forced to store undeliverable e-mail messages and labor in vain to return the messages to an address that does not exist. To the extent that defendants' multitudinous electronic mailings demand the disk space and drain the processing power of plaintiff's computer equipment, those resources are not available to serve CompuServe subscribers. Therefore, the value of that equipment to CompuServe is diminished even though it is not physically damaged by defendants' conduct. CompuServe Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015, 1022 (S.D.Ohio 1997) (citations omitted) (granting preliminary injunction against bulk e-mailer on theory of trespass to chattels); see also Am. Online, Inc .v. IMS, 24 F. Supp. 2d 548, 550 (E.D. Va. 1998) ('rely{ing} on the reasoning of CompuServe' and finding that bulk e-mailer 'injured AOL's business goodwill and diminished the value of its possessory interest in its computer network'). To handle the increased e-mail traffic attributable to deceptive spam, ISPs must invest in more computer equipment.8 Operational costs likewise increase as ISPs hire more customer service representatives to field spam complaints and more system administrators to detect accounts being used to send spam.9Along with ISPs, the owners of impermissibly used domain names and e-mail addresses suffer economic harm. For example, the registered owner of 'localhost.com' alleged that his computer system was shut down for three days by 7,000 responses to a bulk-mail message in which the spammer had forged the e-mail address 'nobody@localhost.com' into his spam's header. Seidl v. Greentree Mortgage Co., 30 F. Supp. 2d 1292, 1297-98 (D. Colo.1998); see also Spamming: The E-

Mail You Want to Can: Hearing Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the Comm. on Commerce, 106th Cong. 9 (1999) (statement of Rep. Gary G. Miller)(attached as App. 4, Br. of Amicus WAISP); 146 Cong. Rec. H6373 (daily ed. July 18, 2000) (statement of Rep. Miller), available at http://thomas.loc.gov/home/c106query.html (recounting similar experience of California constituent).Deceptive spam harms individual Internet users as well. When a spammer distorts the point of origin or transmission path of the message, e-mail recipients cannot promptly and effectively respond to the message (and thereby opt out of future mailings); their efforts to respond take time, cause frustration, and compound the problems that ISPs face in delivering and storing the bulk messages. And the use of false or misleading subject lines further hampers an individual's ability to use computer time most efficiently. When spammers use subject lines 'such as 'Hi There!,"Information Request,' and 'Your Business Records," it becomes 'virtually impossible' to distinguish spam from legitimate personal or business messages.10 Individuals who do not have flat-rate plans for Internet access but pay instead by the minute or hour are harmed more directly, but all Internet users (along with their ISPs) bear the cost of deceptive spam. This cost-shifting–from deceptive spammers to businesses and e-mail users--has been likened to sending junk mail with postage due or making telemarketing calls to someone's pay-per-minute cellular phone.11 In a case involving the analogous practice of junk faxing (sending unsolicited faxes that contain advertisements), the Ninth Circuit acknowledged 'the government's substantial interest in preventing the shifting of advertising costs to consumers.' Destination Ventures, Ltd. v. F.C.C., 46 F.3d 54, 56(9th Cir. 1995) (holding that the

Telephone Consumer Protection Act's (47U.S.C. sec. 227) limitations on commercial speech did not violate the First Amendment). We thus recognize that the Act serves the 'legitimate local purpose' of banning the cost-shifting inherent in the sending of deceptive spam. Under the Pike balancing test, '{i}f a legitimate local purpose is found, then the question becomes one of degree.' 397 U.S. at 142. In the present case, the trial court questioned whether the Act's requirement of truthfulness (in the subject lines and header information) would redress the costs associated with bulk e-mailings. As legal commentators have observed, however, 'the truthfulness requirements (such as the requirement not to misrepresent the message's Internet origin) make spamming unattractive to the many fraudulent spammers, thereby reducing the volume of spam.' Jack L. Goldsmith & Alan O. Sykes, The Internet and the Dormant Commerce Clause, 110 Yale L.J. 785, 819 (2001). Calling 'simply wrong' the trial court's view 'that truthful identification in the subject header would do little to relieve the annoyance of spam,' the commentators assert that '{t}his identification alone would allow many people to delete the message without opening it (which takes time) and perhaps being offended by the content.' Id. The Act's truthfulness requirements thus appear to advance the Act's aim of protecting ISPs and consumers from the problems associated with commercial bulk e-mail. To be weighed against the Act's local benefits, the only burden the Act places on spammers is the requirement of truthfulness, a requirement that does not burden commerce at all but actually 'facilitates it by eliminating fraud and deception.' Id. Spammers must use an accurate, nonmisleading subject line, and they must not manipulate the transmission path to disguise the origin of their commercial messages. While spammers incur no costs in complying with

the Act, they do incur costs for noncompliance, because they must take steps to introduce forged information into the header of their message.12 In finding the Act 'unduly burdensome,'CP at 175, the trial court apparently focused not on what spammers must do to comply with the Act but on what they must do if they choose to use deceptive subject lines or to falsify elements in the transmission path. To initiate deceptive spam without violating the Act, a spammer must weed out Washington residents by contacting the registrant of the domain name contained in the recipient's e-mail address.13 This focus on the burden of noncompliance is contrary to the approach in the Pike balancing test, where the United States Supreme Court assessed the cost of compliance with a challenged statute. Pike, 397 U.S. at 143. Indeed, the trial court could have appropriately considered the filtering requirement a burden only if Washington's statute had banned outright the sending of UCE messages to Washington residents. We therefore conclude that Heckel has failed to prove that 'the burden imposed on . . . commerce {by the Act} is clearly excessive in relation to the putative local benefits.' Id. at 142(emphasis added).Drawing on two 'unsettled and poorly understood' aspects of the dormant Commerce Clause analysis, Heckel contended that the Act (1) created inconsistency among the states and (2) regulated conduct occurring wholly outside of Washington.14 The inconsistent-regulations test and the extraterritoriality analysis are appropriately regarded as facets of the Pike balancing test.15 The Act survives both inquiries. At present, 17other states shave passed legislation regulating electronic solicitations.16 The truthfulness requirements of the Act do not conflict with any of the requirements in the other states' statutes, and it is inconceivable that any state would ever pass a law requiring spammers to use misleading subject lines

or transmission paths. Some states' statutes do include additional requirements; for example, some statutes require spammers to provide contact information (for opt-out purposes) or to introduce subject lines with such labels as 'ADV' or 'ADV-ADLT.' But because such statutes 'merely create additional, but not irreconcilable, obligations,' they 'are not considered to be 'inconsistent" for purposes of the dormant Commerce Clause analysis. Instructional Sys., Inc. v. Computer Curriculum Corp., 35F.3d 813, 826 (3d Cir. 1994). The inquiry under the dormant Commerce Clause is not whether the states have enacted different anti-spam statutes but whether those differences create compliance costs that are 'clearly excessive in relation to the putative local benefits.' Pike, 397 U.S. at142. We do not believe that the differences between the Act and the anti-spam laws of other states impose extraordinary costs on businesses deploying spam.17Nor does the Act violate the extraterritoriality principle in the dormant Commerce Clause analysis. Here, there is no 'sweeping extraterritorial effect' that would outweigh the local benefits of the Act. Edgar v. MITE Corp., 457 U.S. 624, 642, 102 S. Ct. 2629, 73 L. Ed. 2d 269 (1982). Heckel offers the hypothetical of a Washington resident who downloads and reads the deceptive spam while in Portland or Denver. He contends that the dormant Commerce Clause is offended because the Act would regulate the recipient's conduct while out of state. However, the Act does not burden interstate commerce by regulating when or where recipients may open the proscribed UCE messages. Rather, the Act addresses the conduct of spammers in targeting Washington consumers. Moreover, the hypothetical mistakenly presumes that the Act must be construed to apply to Washington residents when they are out of state, a construction that creates a jurisdictional question not

at issue in this case. In sum, we reject the trial court's conclusion that the Act violates the dormant Commerce Clause. Although the trial court found particularly persuasive American Libraries Association v. Pataki, 969 F. Supp. 160(S.D.N.Y. 1997), that decision--the first to apply the dormant Commerce Clause to a state law on Internet use--is distinguishable in a key respect.18At issue in American Libraries was a New York statute that made it a crime to use a computer to distribute harmful, sexually explicit content to minors. The statute applied not just to initiation of e-mail messages but to all Internet activity, including the creation of websites. Thus, under the New York statute, a website creator in California could inadvertently violate the law simply because the site could be viewed in New York. Concerned with the statute's 'chilling effect,' id. at 179, the court observed that, if an artist 'were located in California and wanted to display his work to a prospective purchaser in Oregon, he could not employ his virtual {Internet} studio to do so without risking prosecution under the New York law.'Id. at 174. In contrast to the New York statute, which could reach all content posted on the Internet and therefore subject individuals to liability based on unintended access, the Act reaches only those deceptive UCE messages directed to a Washington resident or initiated from a computer located in Washington; in other words, the Act does not impose liability for messages that are merely routed through Washington or that are read by a Washington resident who was not the actual addressee.

CONCLUSION

The Act limits the harm that deceptive commercial e-mail causes Washington businesses and citizens. The Act prohibits e-mail solicitors from using misleading information in the subject line or transmission path of any commercial e-mail

message sent to Washington residents or from a computer located in Washington. We find that the local benefits of the Act outweigh any conceivable burdens the Act places on those sending commercial e-mail messages. Consequently, we hold that the Act does not violate the dormant Commerce Clause of the United States Constitution. We reverse the trial court and remand the matter for trial. The trial court's order on attorney fees is vacated.

WE CONCUR:

1 "Commercial electronic mail message' means an electronic mail message sent for the purpose of promoting real property, goods, or services for sale or lease.' RCW 19.190.010(2). The term 'spam' refers broadly to unsolicited bulk e-mail (or "junk' e-mail'), which 'can be either commercial (such as an advertisement) or noncommercial (such as a joke or chain letter).' Sabra-Anne Kelin, State Regulation of Unsolicited Commercial E-Mail, 16 Berkeley Tech. L.J. 435, 436 & n.10 (2001). Use of the term 'spam' as Internet jargon for this seemingly ubiquitous junk e-mail arose out of a skit by the British comedy troupe Monty Python, in which a waitress can offer a patron no single menu item that does not include spam: 'Well, there's spam, egg, sausage and spam. That's not got much spam in it.' 2 Graham Chapman et al., The Complete Monty Python's Flying Circus: All the Words 27 (Pantheon Books 1989); see also Kadow's Internet Dictionary, at http://www.msg.net/kadow/answers/s.html (last visited May 7, 2001). Hormel Foods Corporation, which debuted its SPAM luncheon meat in 1937, has dropped any defensiveness about this use of the term and now celebrates its product with a website (www.spam.com). See Hormel Objects to Cyber

Promotions' Use of 'SPAM' Mark, 4 No. 1 Andrews Intell. Prop. Litig. Rep. 19 (1997); Laurie J. Flynn, Gracious Concession on Internet 'Spam,' N.Y. Times, Aug. 17, 1998, at D3. Because the term has been widely adopted by Internet users, legislators, and legal commentators, we use the term herein, along with its useful derivatives 'spammer' and 'spamming.'

2 "Electronic mail address' means a destination, commonly expressed as a string of characters, to which electronic mail may be sent or delivered.'RCW 19.190.010(3).

3 The subject line, similar to the 'RE' line of a letter or memorandum, is generally displayed (at least in part) alongside the sender's name in the recipient's e-mail inbox.

4 Each e-mail message, which is simply a computer data file, contains so-called 'header' information in the 'To,' 'From,' and 'Received' fields. When an e-mail message is transmitted from one e-mail address to another, the message generally passes through at least four computers: from the sender's computer, the message travels to the mail server computer of the sender's Internet Service Provider (ISP); that computer delivers the message to the mail server computer of the recipient's ISP, where it remains until the recipient retrieves it onto his or her own computer. Every computer on the Internet has a unique numerical address (an Internet Protocol or IP address), which is associated with a more readily recognizable domain name (such as 'mysite.com'). As the e-mail message travels from sender to recipient, each computer transmitting the message attaches identifying data to the 'Received' field in the header. The information serves as a kind of electronic postmark for the handling of the message. See Clerk's Papers (CP) at 130-34. It is possible for a sender to alter (or 'spoof') the header information by misidentifying either the computer from which

the message originated or other computers along the transmission path. See Kelin, supra note 1, at 445.

5 See RCW 19.190.010(6) (defining 'Internet domain name').

6 '(1) No person may initiate the transmission, conspire with another to initiate the transmission, or assist the transmission, of a commercial electronic mail message from a computer located in Washington or to an electronic mail address that the sender knows, or has reason to know, is held by a Washington resident that: '(a) Uses a third party's internet domain name without permission of the third party, or otherwise misrepresents or obscures any information in identifying the point of origin or the transmission path of a commercial electronic mail message; or '(b) Contains false or misleading information in the subject line. '(2) For purposes of this section, a person knows that the intended recipient of a commercial electronic mail message is a Washington resident if that information is available, upon request, from the registrant of the Internet domain name contained in the recipient's electronic mail address.'RCW 19.190.020.

7 The experience of 1 of the 17 complainants to the Attorney General's Office is illustrative. Nancy Smith received Heckel's spam on September 1,1998; the message was sent from a Juno account with the user name'apollo1113,' and the subject line read 'For your review--HANDS OFF.' CP at 140. On or about September 1, 1998, Smith sent a copy of the Natural Instincts order form with a check for $39.95 by U.S. Mail to the Salem, Oregon, address provided on the order form. Hearing nothing for some weeks, Smith sent a message by return e-mail on September 30, 1998, but within a minute she received a return e-mail from Juno stating that the attempt had failed due to termination of the account. Unable to find any information about Natural Instincts on the Internet, Smith

contacted her bank and learned that the check had cleared two weeks earlier. Smith then contacted the Attorney General's Office. CP at 140-41, 149-50.

8 '{W}hen Internet users attempt to reply to deceptive spam that has a fraudulent return address or domain name, one e-mail message (and the ISP{'s} related computer log entry) instantly becomes three separate e-mail messages (and additional computer log entries) because: (1) the ISP server that is the victim of the fraudulent return address or domain name sends an error message back to the Internet user and their ISP announcing that the return path was invalid, (2) a message is sent to the server administrator requesting an investigation of the return address for potential problems, and (3) a message is sent to the server log in case the ISP wishes to track down the problem later. With bulk spam, these messages snowball to clog ISP resources, and ISPs have little choice but to purchase additional equipment at a significant cost.' Br. of Amicus Washington Association of Internet Service Providers (WAISP) at 11-12.

9 See Br. of Amicus WAISP at 12-13; see also Spamming: The E-Mail You Want to Can: Hearing Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the Comm. on Commerce, 106th Cong. 41-42 (1999)(statement of Michael Russina, Director of Systems Operations, SBC Internet Services) (attached as App. 4, Br. of Amicus WAISP).

10 Testimony of Ed McNichol at Hearing on H.B. 2752 Before the Washington House Comm. on Energy and Utilities (Jan. 28, 1998) (partial transcript attached as App. 2, Br. of Amicus WAISP; audio also available at http://198.239.32.162/ramgen/199801/1998010112.ra).

11 See Spamming: The E-Mail You Want to Can, supra note 9, at 1 (statement of Rep. W.J. Tauzin, Chairman, Subcomm. on

Telecommunications, Trade, and Consumer Protection) (attached as App. 4, Br. of Amicus WAISP).

12 'This generally involves paying a bulk re-mailing service to forge e-mail headers and send out the spammer's message, or at least running additional software programs to alter the e-mail messages' address and domain name information.' Br. of Amicus WAISP at 8.

13 See RCW 19.190.020(2). The Washington Association of Internet Service Providers (WAISP) and the Washington Attorney General co-sponsor a registry of Washington residents who do not want to receive spam. See WAISP Registry Page, at http://registry.waisp.org (last visited May 7, 2001).

14 Jack L. Goldsmith & Alan O. Sykes, The Internet and the Dormant Commerce Clause, 110 Yale L.J. 785, 789 (2001).

15 See Goldsmith & Sykes, supra note 14, at 808 (concluding that 'inconsistent-regulations cases, like extraterritoriality cases, should be viewed as just another variant of balancing analysis'); see also William Lee Biddle, State Regulation of the Internet: Where Does the Balance of Federalist Power Lie? 37 Cal. W. L. Rev. 161, 167 (2000) (suggesting that'{t}he burden placed on interstate commerce through inconsistent local regulation is more appropriately placed as part of the Pike balancing test, rather than its own, separate line of inquiry').

16 See David E. Sorkin, Spam Laws, at http://www.spamlaws.com/state/index.html; see also Max P. Ochoa, Legislative Note: Recent State Laws Regulating Unsolicited Electronic Mail,16 Santa Clara Computer & High Tech. L.J. 459 (2000); Br. of Appellant at23 and App. A, B. Proposed federal legislation, the Unsolicited Commercial electronic Mail Act of 2000, H.R. 3113, 106th Cong. (2000), was passed by the House on July 18, 2000, and has been referred to the Senate Committee on Commerce, Science, and

Transportation. The text of the bill may be accessed through http://thomas.loc.gov/home/c106query.html.

17 As the State notes, '{p}resently, mail and phone solicitors are expected to abide by different states' telemarketing laws and other consumer protection laws. E-mail solicitors should not be excused from the burden of complying with a state's law simply because of the ease of sending bulk e-mail solicitations in relation to other forms of commercial solicitation.' CP at 53.

18 See CP at 216. At least 10 other cases have distinguished American Libraries. See, e.g., Hatch v. Super. Ct., 80 Cal. App. 4th 170, 94 Cal.Rptr. 2d 453 (2000); People v. Hsu, 82 Cal. App. 4th 976, 99 Cal. Rptr. 2d184 (2000); Ford Motor Co. v. Tex. Dep't of Transp., 106 F. Supp. 2d 905,909 (W.D. Tex. 2000).